The Implicit Sharia: Established Religion and Varieties of Secularism in Tunisia

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Malika Zeghal
mzeghal@fas.harvard.edu

The Tunisian uprisings of December 17, 2010-January 14, 2011, which resulted in the departure of President Ben Ali from the country, began a new political era for Tunisians. In particular the legal structures of the authoritarian regime now seemed ripe for deep transformations: soon after the departure of Ben Ali, street demonstrators asked for the election of a Constituent Assembly that would draft a new constitution. Slogans and posters read: "A Constituent Assembly to change the constitution," and "Cancel the constitution: it is a duty."[1] During this extraordinary and ephemeral political moment, it seemed that Tunisians could reconfigure their legal structures and start anew, given that they were united in a consensus against the old structures of the authoritarian regime and the provisory government. For many Tunisians, Tunisia's 1959 constitution had to be abrogated and replaced by a democratic one. In spite of diverging views on this matter among political and legal elites, on March 3, 2011, the interim president of the republic announced the election of a constituent assembly for the summer of 2011.

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1 Céline Lussato "La révolution tunisienne n'est pas terminée," La Nouvel Observateur, February 1, 2011, http://tempsreel.nouvelobs.com/actualite/monde/20110221.OBS8387/reportage-la-revolution-tunisienne-n-est-pas-terminee.html (accessed June 6, 2011).

If the desire for democracy seemed to be the most important aim uniting all Tunisians on and after January 14, the question of what democracy meant involved more contentious matters, particularly with respect to religion. Remarkably absent during the uprisings, Islam came to the fore afterwards as a crucial factor in public deliberations on two fronts: the future constitution and family law. It seemed that the future of democracy could not be discussed outside of these two interrelated questions. More specifically, debates over the relationship between the state and religion and over the status of women in a democratic Tunisia brought Islam to the center of the nascent political debate. Two questions raised high anxieties in the media and among the population, prompting news articles and even demonstrations in the street. The first was: would the emergence of a democratic system be accompanied by a separation of state and religion, hence leading to the elimination of the 1959 constitution's Article 1 stating that "Tunisia is a free, independent and sovereign state. Its language is Arabic, its religion is Islam, and its regime is the Republic"?[2] Second, would democracy "bring back sharia," and thereby endanger the advancements in women's rights since independence?

These two questions implicitly assumed that since the post-colonial reforms of family law had been imposed through authoritarian state policies, the advent of democracy would lead to the return of "sharia." Among secularists, it was thought that religion, which the authoritarian state had repressed for a long time, could no longer be controlled and censored by a more democratic state and therefore posed a danger for social peace. For the secularists, since Islam had been repressed for so long, its comeback would certainly be somewhat violent and constitute a threat

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2 Tunisian Republic, *Munāqashāt al-majlis al-qawmī al-ta'sīsī*, Markiz al-buḥūth wa'l-dirāsāt al-barlamānīya, vol. 2 (Bardo, 2009), 355.

to all the progressive values that had been at the center of policy making, even if they had been enforced by a dictatorship. For the Islamists, this return of Islam to the public scene would not be an obstacle for democracy, but would rather allow for the public re-emergence of an Islamic identity that had been marginalized for decades. However, in the discussions that took place around this issue among prominent political activists, the concept of sharia as the foundation for legislation was rejected not only by secularists, but also by mainstream Islamists belonging to the newly legalized al-Nahdha party.

Coming back to Tunisia after twenty years of exile, Rached Ghannouchi, the leader of the Islamist al-Nahdha, declared on January 30, 2011, that "sharia had no place in Tunisia."[3] In the election of October 23, 2011, al-Nahdha won 40 percent of the seats in the Constituent Assembly and allied with two smaller parties of the center-left to form a new government. In the middle of March 2012, while the Constitutional Committee charged with drafting the preamble of the constitution was tackling the question of Islam, tensions heightened in the streets. Islamists of all stripes—from members of al-Nahdha to Salafist groups—demonstrated in favor of including sharia law in the constitution. They expressed themselves against those who thought that Article 1 was sufficient because sharia was not needed and even posed a threat for democracy and women's rights. This tension was in part resolved by a vote among the leadership of al-Nahdha in favor of keeping Article 1 without mentioning sharia law. On March 26, 2012, the Islamist party published a communiqué stating that "the formulation of the 1959 constitution's article 1… is clear and is agreed upon by all the components of society. This article preserves the Arab and

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3 "Tunisie: L'islamiste Rached Ghannouchi ne briguera pas la présidence," Le Parisien, January 30, 2011. http://www.leparisien.fr/flash-actualite-monde/rached-ghannouchi-le-visage-de-l-islamisme-tunisien-rentre-au-pays-30-01-2011-1277385.php (accessed July 22, 2011).

Islamic identity of the Tunisian state. At the same time, it confirms the civil and democratic character of the state."[4] On the same day, Rached Ghannouchi called a press conference during which he explained the choice made by al-Nahdha, a choice approved by 53 votes against 13 in the Founding Committee of the party: "these recent days, a controversy arose about the mention of sharia law in the future constitution, to the point that society almost split ideologically between the pro and anti-sharia. In reality, 90% of the Tunisian law is in conformity with sharia law."[5]

Within the Islamist party, some disagreed with this decision. As Riadh Chaïbi, Chairman of the Organizing Committee of the ninth congress of al-Nahdha told me:

> It was quite difficult [to make this decision]. There is an emotional aspect about the issue of sharia. It is about affects. Of course, there is a tendency to become attached to names without paying attention to content. The word "sharia" is a word deeply rooted in intellectual history, in the history of Islam. There is no one anymore who can say that they are against sharia if they claim an Islamic reference… We are not saying that Sharia is not part of our thought or that we do not recognize sharia. We only said that we would not mention it in the constitution. We want to search for new forms of the meaning of sharia. (…) If sharia becomes the source of legislation, and if a secularist party wins the election with a majority, will the assembly take that party to the constitutional court? Would this contradict democracy? (…) These are very important questions for us.[6]

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[4] Al-Nahdha Party, *Bayān*, Tunis, March 26, 2012.

[5] Rached Ghannouchi, Press Conference, March 26, 2012. Quoted in Leaders, March 26, 2012, http://www.leaders.com.tn/article/pourquoi-ennahdha-a-accepte-le-maintien-de-l-article-1er-de-la-constitution-de-1959?id=8023 (accessed October 16, 2012).

[6] Interview with Riadh Chaibi, May 30, 2012, Tunis.

While it seemed logical for secularists to refuse sharia as the basis of the law, such a decision might seem surprising coming from Islamists. Al-Nahdha's position was all the more surprising given that polls showed that the majority of Tunisian public opinion was in favor of sharia being a source, but not the only source, of legislation.[7] Perhaps equally surprisingly, secularists accepted that Islam remain "the religion of the state," thereby shunning the principle of the separation of state and religion as a prerequisite for democracy. For instance, Riadh Guerfali, a Tunisian specialist of public law, wrote in the Tunisian blog *Nawaat*, which played a crucial role during the uprising, that the statement "Islam is the religion of the state" actually guaranteed secular democracy.[8] I will come back to this line of reasoning later in this chapter. Here again the secularists and the Islamists from al-Nahdha broadly agreed on the project of democracy combined with religious establishment and secular law. While the issue of a return of sharia as a foundation for legislation was very present in the news in Tunisia during this time, no major political party or activist seemed inclined to challenge Article 1 of the Constitution or the advances made on women's legal status through secular law since 1956.

This concordance of views can partly be analyzed as a political compromise reached by secularists and Islamists in order to survive a transitional period during which risks of instability might threaten all political groups. However, this chapter argues that there are also deep

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[7] Gallup, "After the Arab Uprisings: Women on Rights, Religion, and Rebuilding," Summer 2012. http://www.gallup.com/poll/155009/Uprisings-Women-Rights-Religion-Rebuilding.aspx (accessed October 29, 2012). On the question of popular legal consciousness and Muslim legal theory, see Tamir Moustapha, "Islamic Law, Women's Rights, and Popular Legal Consciouness in Malaysia," forthcoming in *Law and Social Inquiry*.

8 See, for instance, Riadh Guerfali, "'L'islam religion d'Etat'. Disposition constitutionnelle garante du processus sécularistе de la démocratie tunisienne," March 31, 2011, http://nawaat.org/portail/2011/03/31/islam-religion-detat-disposition-constitutionnelle-garante-du-processus-seculariste-de-la-democratie-tunisienne/ (accessed July 22, 2011).

historical reasons for such a broad convergence, and describes the subtle and ambiguous ways in which secularists and Islamists continue to diverge in their views on Islam and the state. These two mutually antagonistic groups speak within a single framework whose principles shape the strategies and narratives of both sides. This framework is the end result of a radical transformation of the relations between Islam, sharia, and the state during the nineteenth and twentieth centuries, a transformation that undermined the role of sharia and reduced it to an obscure and unstable place in conceptions of secular law. The gradually diminishing role of sharia under the aegis of the modern state explains why the notion of sharia as a foundation for law is illegible for the Islamists as well as for the secularists. The colonial and post-colonial Tunisian state progressively transformed sharia from a revealed source that operated as a guiding principle for adjudication by the jurist into an implicit point of reference regulating the interaction of two specific domains—the state and the family—that state elites saw as tightly connected.

This shift from sharia as a guiding principle for the jurist to the "implicit sharia" as a distant reference for the law is related to the growing role of the modern state as a legislator that uses the law to fashion the private lives of its subjects in order to make them "modern" citizens who live in the shadow of a state whose identity is "Muslim." As underlined by Wael Hallaq,

> The demise of the shari'a was ushered in by the material internalization of
> the concept of nationalism in Muslim countries, mainly by the creation of
> the nation-state. This transformation in the role of the state is perhaps the
> most crucial fact about the so-called legal reforms. Whereas the traditional
> ruler considered himself subject to the law and left the judicial and

legislative functions and authority to the 'ulama, the modern state reversed

this principle, thereby assuming the authority that dictated what the law is

or is not.[9]

In the case of Tunisia, during the eighteenth and nineteenth centuries, the fiction of the independent jurist was maintained in the official language of the law, whereas in reality the sovereign encroached on sharia law. After independence the state became the legislator, using the secular law as an instrument authoritatively to change family life from a patriarchal structure to a model of increased gender equality.[10] Despite its narratives of "women's rights" and "women's emancipation," the authoritarian state was in fact far from "liberating" women, since it was exercising its implacable authority on all citizens of Tunisia.

This enterprise of social transformation was a project of domestication of practices and forms of life that had thus far escaped the state's regulation. Sharia law, with its jurisprudential expressions, represented one of these forms. In a 1965 speech given in Ankara, Habib Bourguiba, president of Tunisia from 1957 to 1987, subtly described the transformation that had been at play before him and for which he would continue to advocate. He presented it as a compromise that would not lead to separation of state and religion:

Let us not forget that for the Arabs, religion preceded the state. Before the state, religion

legislated. By the side of the state, and with the state, religion must guide, inspire, and

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9 Wael Hallaq, "Can the Sharia be restored?" in Yvonne Y. Haddad and Barbara F. Stowasser *Islamic Law and the Challenges of Modernity*, eds Yvonne Y. Haddad and Barbara F. Stowasser (Walnut Creek, Altamira Press, 2004), 21-53.

[10] For a comparative analysis of these transformations in Northern Africa, see Mounira Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco*, University of California Press, 2001.

harmonize. We consider these two entities [the state and religion] to be complementary, not contradictory, and it appears to us more legitimate to unite them than to separate them.[11]

In this new framework characterized by the central presence of the modern state—and by the idea of a "unity" of religion and state—the state took on the role of legislator. It relegated sharia—conspicuously absent from Bourguiba's 1965 speech—to an uncertain and precarious role while making "Islam" as a religion an object to regulate as well as the foundation of its own identity. After the uprisings of 2010-2011, it was within this framework of religious establishment and secular law that all Tunisian political elites, including the leadership of al-Nahdha party, understood the marked role of Islam in the state—a by-product of colonial and post-colonial state interventions, rather than the result of the presence and the activism of the Islamists themselves. They all accepted the role of religion in the Constitution, but made sharia at most a "reference" that had participated historically in the modern state's formulation of the secular law, if not merely a thing of the past that had disappeared.

To understand the common framework under which the al-Nahdha party and Tunisian secularists operate, I explain in part I how, starting in the 19th century, a new legal regime made sharia progressively "implicit" in Tunisia. In part II, I examine the legal debates about the significance of sharia in Tunisian law in post-colonial times. In part III, I show how, in post Ben

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11 Quoted in Ahmed Mestiri, Preface to Nazli Hafsia, *Le contrat de mariage en Tunisie jusqu'à 1956* (Carthaginoiseries, Tunis, 2005), 8.

Ali Tunisia, religious establishment, rather than sharia law, provides the tools that the al-Nahdha Party uses to protect and reinforce the Islamic identity of the Tunisian state and society .

I.   The Genealogy of Family Law Codification: the Implicit Sharia

In nineteenth-century Tunisia, a movement for codification of the law was initiated and encouraged by state administrators and reformers such as Khayr al-Din al-Tunisi and foreign agents, in particular British and French consuls. It was inspired by a deep dissatisfaction with the state of affairs of the legal system. The Europeans criticized the perceived disorder and arbitrariness of the legal system, which prevented them from conducting business in the country in the way they saw fit. They pressured the Bey of Tunis to proclaim the Security Pact (1857) and the Constitution (1861), which reformed the legal status of all residents of the Regency. The security pact of 1857 guaranteed the equality of all residents of the Regency regardless of their "religion," their language, and their "color" (*al-adyān, al-alsina, wa'l-alwān*).[12] The Constitution of 1861 established new tribunals that would adjudicate on commercial and criminal issues. These issues were thereafter taken out of the purview of the Bey's personal judiciary and out of the sharia tribunals.[13]

Between 1856 and 1876, the Bey's government reorganized the sharia tribunals by circumscribing their domain to that of family law, endowments, and property, and by formalizing their operations in more official structures.[14] Thus, before the occupation of Tunisia by the

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[12] *Qānūn al-dawla*, (Tunis: Matba 'at al-dawla al-Tūnisīya, 1861), 6.

13 Therese Womble, *Early Constitutionalism in Tunisia, 1857-1864: Reform and Revolt.* PhD diss., (Princeton University, 1997).

14 A. Sébaut, *Dictionnaire de législation tunisienne* (Paris : Marchal et Billard éditeurs, 1888) 212. See also Bahri Guiga, *Essai sur l'évolution du Charaa et son application judiciaire en Tunisie* (Paris : Jouve et Compagnie Editeurs,

French, sharia tribunals were already limited to a domain that the French authorities would only shrink further during their presence in Tunisia (1881-1956). Th French eliminated property rights and real estate issues from the purview of the sharia tribunals in order to control land more easily. Family law remained the domain of the *qadis*, however, who adjudicated through their traditional system of jurisprudence based on either Maliki or Hanafi law, while the rest of the legal system was subject to recently published codes. In the eyes of the French authorities and of many Tunisian jurists, this legal dualism had many faults: in particular the new context of the modern state made it necessary to formalize the institutions of marriage and divorce under the state's own aegis and made Muslim law, which kept family matters regulated in informal ways and out of the control of the state, an anomaly.

The Tunisian reformists at times conformed to European demands, since the legal texts of 1857 and 1861 intended to counter the sovereign's despotism, but with a true dislike for the French and British attempts to dictate their terms to the Regency. Using the same narratives as other reformists such as Muhammad Abduh in Egypt, they denounced the obscurity of the *shar'i* legal process, its lack of standardization, and its consequent arbitrariness. For the ulama who expressed their desire to reform the legal system and codify sharia, it was not that sharia was impossible to implement, but simply that the *ad hoc* process that characterized sharia courts was

1930); Robert Brunschvig, "Justice laïque et justice religieuse dans la Tunisie des Deys et des Beys jusqu'au milieu du XIXème siècle," *Studia Islamica* 23 (1965) : 27-70. For a historical testimony on these legal transformations, see Ahmad Ibn Abi Diyaf, *Itḥāf ahl al-zamān bi-akhbār mulūk tūnis wa 'ahd al-amān*, al-dār al-'arabiyya lil-kitāb, (Tunis: al-Maṭba'ah al-Rasmīyah lil-Jumhūrīya al-Tūnisīyah, 1063-1966). The most detailed second-hand account is in Muhammad Bouzghiba, *Harakat Taqnīn al-fiqh al-islāmī bi'l-bilād al-tūnisiyya (1857-1965),* (Tunis: Markiz al-nashr al-jāmi'ī, 2003).

not legible anymore: it appeared disorganized and was viewed as corrupt and unjust. This, they explained, was not a result of the substance of the sharia but rather of the procedures through which it was implemented. There was a need to codify the law into a standardized text—as opposed to a stock of compendia written by medieval jurists and only known to and understandable by a few specialists—in order for it to be accessible to both judges and litigants. In his 1922 essay *Martyr Tunisia*, addressed to the French public as a request for full Tunisian sovereignty, Shaykh Abdelaziz al-Thaalibi dedicated a chapter to the justice system. He described the judicial organization of Tunisia as "a monstrous monument of insecurity and injustice.… There is not one system of justice in Tunisia: there are five systems of justice: a French system of justice that represents French sovereignty, a Tunisian-Muslim system, a Jewish system, a secular system and a mixed (French-Tunisian) system." Commenting on the Muslim sharia court (what he called the "Tunisian-Muslim system") he described it as "archaic." "Its difficult situation," he wrote,

> is not caused by Muslim law itself, but by the poor organization of this
> court and the lack of codes… The procedure is dense and inextricable. The
> judge does not adjudicate according to his opinion and he has no power of
> appreciation. He is bound to a system of legal proofs. … In order to prove a
> fact, as well as to challenge it, there is a need for at least two witnesses.
> Hence the number of witnesses in a trial might increase indefinitely… and
> the trial might last for years, sometimes generations! … Contrary to the
> exigencies of Muslim law, the judgments are never justified. There is no
> administrative organization, nothing is filed, the titles of the defendants are
> lost on the benches, at the judges' homes, or in the notaries' offices. And on

top of all of this, there is no clerk at the hearings. … At the hearings, nothing is registered in writing. Errors are easy to make for it is often difficult for the court to remember the meaning of its judgment… The [French] government follows with a passionate interest the decline of our system of justice. [The French government] holds in its power, through the most minute details of our family life and properties, the destiny of our society.[15]

This was not an isolated criticism of the operations of the sharia courts—it echoed earlier objections both in Tunisia and in other Muslim societies in the Middle East.[16] The colonial state was also in need of a more controllable system of justice. In 1948, Shaykh Abdelaziz Djait, who was minister of Justice and Shaykh al-Islam—the highest religious position in the realm—codified family law in order to integrate it in one text. In doing so he was both following the requests of French authorities and acting upon a desire to rationalize and standardize the law that seemed to be commonly shared among jurists, as illustrated by al-Thaalibi's evaluation of sharia courts. The project was declared necessary to produce a standardized set of rules. Its stated aim was to remedy the poor situation of the sharia courts in which judges adjudicated according to their personal whims and defendants took advantage of the existence of two schools of law to maximize their interests.[17]

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15 Abdelaziz al-Thaalibi, *La Tunisie martyre* (Paris : Jouve et Companie éditeurs, 1922), 52-53.

16 Muhammad Abduh, *Taqrīr fī iṣlāḥ al-maḥākim al-sharʿiyya* (Cairo : Al-manār press, 1900).

17 The defendant could chose to be tried in a Hanafi or Maliki court of law, and even switch in mid trial, especially if the outcome of the trial was becoming unfavorable.

The "Djait Code"[18] was drafted by a large committee composed of ulama, lawyers, journalists, and intellectuals working under the patronage of the Ministry of Justice. It dealt with land ownership and personal status issues and summarized the principal provisions of the Malikite and Hanafite schools of law in these two domains. It was never applied under the French protectorate, but its form and content help make clear the transformation at play in Muslim law in twentieth-century Tunisia. The text was organized into two columns, one for the Hanafi interpretation—a remnant of Ottoman influence—and the other for the Maliki school of law, the principal school of law in Tunisia. The columns at times contained empty parts when one school presented specific provisions on one issue with which the other school did not deal. From this foundation the judges were supposed to draw their own judgments. They could chose to refer to either one of the two columns, since these were not to be read as two "competing" interpretations, but rather as two collections of possible references that could be combined. While the Djait Code was never used in courts, it served as a template for the new Personal Status law drafted by the independent Tunisian state in 1956.

In 1956, Bourguiba instituted the Personal Status Code (PSC, or *majallat al-aḥwāl al-shakhṣīya*). It was registered in the *Gazette* (*al-rā'id al-rasmī*) on August 13, 1956, five months after the independence of Tunisia, and began to be applied in January 1957. While the Constituent Assembly, which also operated as a legislative body, began to convene on April 8, 1956, the text of the Code was neither discussed nor presented to the vote of the members of the

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[18] *Lā'iḥat majallat al-aḥkām al-shar'īya* (Tunis: Matba'at al-idāra, n.d.).

Assembly.[19] Rather, it was imposed by Bourguiba and his closest aides outside of the deliberative arena of the Constituent Assembly. However, the Code was in fact an object of deep contention. Had it been brought before the Assembly, discussion certainly would have been heated, as shown by the opposition to the new Code echoed by the press at the time. In particular the newspaper *al-Istiqlāl* voiced the strong disapproval of many conservative ulama from the Zaytūna University. Responding to a request for a fatwa on the new Code, Djait published his opinion in the fall of 1956 in *al-Istiqlāl*. Holding an official position within the state's administration, he did not want to be perceived as frontally opposing the government and as a trouble maker. In a style typical of ulama's respectful but critical advice to the political authorities, he wrote:

> I say to those who requested a fatwā that it is not lawful for the sincere believer to cause discord, which spreads dissension, provokes hatred and resentment and destroys the nation's unity. Indeed, it leads to public damage (*adhrār 'āmma*) and surely to catastrophes that will harm our dear country most deeply. A request for a fatwa made for this odious aim is only bad deceit. However, if the objective is to know the truth and the divine law, in order to request from the popular government the revision of the articles contradicting the sharia' regulation (*ḥukm sharʿī*) and if the request is made in a way to avoid provoking disorder and trouble, then I want to reassure the authors of the request that I have done my duty and wrote to

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19 Women's voting rights were discussed during the February 3, 1958 session of the Constituent Assembly. After a long debate, women's right to vote was approved by a bare majority. See *Munāqashāt*, vol. 2, 83-92.

the Ministry of justice to ask for modification of articles 14-18-19-21-30-35-88.[20]

The provisions of these seven articles out of the 170 of the original 1956 Code were unacceptable in their substance to most Tunisian ulama except for a few who agreed to officially support the project on behalf of the state. The articles, which presented a significant departure from Muslim law, made repudiation a legal impediment to the remarriage of the husband, criminalized polygamy, and mandated that all divorce requests go through the courts. On the whole, however, the PSC was in large part inspired by the Djait Code. The articles concerning descent, dowry, and inheritance respected Muslim law. The PSC also abolished constraint in marriage (*jabr*), replacing it with the mandatory mutual agreement of the prospective spouses, a provision that Djait had accepted.

Bourguiba was unwilling to put the matter of family law up for public deliberation, so the sharia courts were abolished, and their personnel integrated in the unified justice system by state decree in the fall of 1956. He had to act quickly, because the nationalization of the justice system, still in the hands of the French administration, was at stake. He wanted to prove to the French that Tunisia could have a secular and "modern" system of justice. The ulama felt that their own domain of activity was being threatened and indeed annihilated, and that the very substance of the sharia that they were supposed to interpret was disappearing from the law. Hence their opposition to the new Code was a defence of their professional body as well as a defence of the substance of the law. Since, however, as Shaykh Djait said, the ulama preferred to avoid provoking public disorder and sought to preserve "national unity"—and since Bourguiba

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20 Muḥammad al-ʿAzīz Jʿayyit, "Jawāb ʿan al-istiftāʾ," *Al-Istiqlāl* 47 September 14, 1956, 1.

had the upper hand—a compromise was reached. The discussions in the Constituent Assembly were leading towards the recognition that Islam was "the religion of the state." Shaykh Muhammad al-Tahar Ben Achour, a high ranking scholar who had been appointed Dean of the Zaytuna University at the time, gave his approval to the Code: "We give our full confidence to a government that has declared itself a Muslim government in its first fundamental law, to proclaim laws that are accepted by the elite and the whole community."[21] A *quid pro quo* had been established between part of the official ulama and Bourguiba's regime. On the one hand, Bourguiba agreed to make Islam constitutive of the state through Article 1 of the Constitution, which by and large satisfied the ulama. On the other hand, however, the ulama had to accept the breaches of Islamic law in the Personal Status Code. The compromise was nonetheless based on an unequal balance of power. If the Code was criticized by the ulama, the contentious articles were never modified towards a more "Islamic" interpretation as Djait had hoped. In 1959, Article 1 of the Constitution became a symbolic compensation for those who wanted Islam to remain a marker of the nation's identity. Sharia had been invoked at length in the 1861 Constitution of the Tunisian Regency. It disappeared from both the 1959 Constitution and the 1956 family law. This fading of sharia, imposed through an unequal compromise by Bourguiba's new state, has left, as we will see, indelible marks on Tunisian debates regarding Islam and secularism.

Indeed, if the Personal Status Code itself did not invoke sharia, the official state narratives justifying the PSC insisted on the Code's roots in sharia law as well as on its progressive and modernist aspects. The Code was deemed necessary to solve the problems

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21 Quoted in République tunisienne, Ministère des Affaires Religieuses, *Le Code du Statut Personnel. Enracinement dans l'islam et modèle de partenariat effectif* (Editions Ministère des Affaires Religieuses, (Tunis: 2008), 103-104.

plaguing the legal system, such as the multiple jurisdictions and the dual Hanafi-Maliki system in family law. The preface to the 1958 edition of the Code stated that in the past the "mainstream opinions were to serve as a basis for judges and were even difficult to discern from the compendia written by the different theologians that diverged from one another on each issue."[22] In order to resolve this issue, the Code made law transparent, public, and efficient: "Our modern times," it read, "request that our litigations be adjudicated rapidly, and that an instrument that is easy to consult be put at the disposal of the judges and the litigants." In addition, the same preface described the Code as the product of a specific interpretation of sharia:

> The venerable Islamic legislation (*al-tashrī' al-islāmī*) represents justice with its universal principles and is also faithful to the needs of the human person whatever the times and the conditions. The 1932 international conference of The Hague on comparative law has recognized with respect and admiration that [the Islamic legislation] can be one source of comparative law. Hence, the drafter of the Code has chosen from the depths of this Islamic legislation what can respond to all these needs (…) with a style that is easy and understandable in all its parts and that can be accepted by the elites and be clear for the masses.[23]

The "depths of [the] Islamic legislation" were a reference to sharia, but also to the fact that the ancient Islamic legislation was difficult for the masses to access. Because of its opacity, it had to be "rewritten" for clarity, and so that all of the members of the new nation would understand.

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22 Muhammad al-Tahar al-Sanusi, Dā'irat al-tashrī' al-tūnisī, *Majallat al-Aḥwāl al-shakhṣiyya*, 2nd edition, (Tunis : no publisher, 1958), 3.

23 Muhammad al-Tahar al-Sanusi, Dā'irat al-tashrī' al-tūnisī *Majallat al-aḥwāl al-shakhsīya*, (Tunis: no publisher, 1958), 3-4.

However, once rewritten in a new language, sharia itself became even more unreachable. Sharia was still "venerable" and admired by Western scholars, in the words of the introduction to the Code. But its social efficacy had to be attained by new means, that of a codified law whose process was entirely different from that of sharia law.[24] Secular law was more able than sharia to be an instrument for the development and "modernization" of society. Even in absentia, however, sharia was objectified in this official narrative as a legislation "faithful to the needs of the human person whatever the times and the conditions," which echoed the ulama's conception of sharia law. Therefore, sharia was not totally erased from the narratives about the new Code. It became implicit, but, even in its implicitness, it remained all-encompassing because it was described as able to deal with all needs, in all times. The new Code itself, in its secular form, was equally totalizing: it was readable and understandable by all, a universally recognized and applicable law for all Tunisians that would reorganize their family lives. The August 3, 1956 communiqué of the Ministry of Justice insisted on the legacy of the Djait Code as well as on the radically new format of the Code: "We avoided rare words, which only the jurists *(fuqāhā')* specialized in these disciplines use, as well as words that do not correspond to the current tastes and practices… We have dealt with broad questions and important issues and have neglected the details, which we left to the judge who will solve them by looking at the main reference books and fundamental texts, if need be."[25] Judges often understood that the "main reference books and fundamental texts" meant that they could refer to Islamic law when the Code was silent on

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24 Wael Hallaq, "Can the Sharia be restored?".

25 Quoted in Ministère des Affaires Religieuses, 34.

certain issues. The implicitness of sharia law allowed it to reappear in legal cases, which showed that its domestication was not complete.[26]

After 1956 the PSC gained a high legal status in the hierarchy of Tunisian laws, comparable to that of the Constitution. The official state narratives have insisted on its "modernist" dimension as well as on its "Islamic legacy," and have underlined the exceptionality of the Tunisian case in the Arab world. In 2006, at a conference celebrating the fiftieth anniversary of the Code in Qayrawan, the religious capital of Tunisia, the Minister of Religious Affairs reminded his audience that it was based on the Djait project and that the PSC was "inspired by Islam, which is considered as a whole, vast, coherent and indivisible."[27] This meant that, according to him, the codification of family law had not fragmented Islamic law by drawing from it only partially, but was comparable to its full translation. In the same publication, an article by Mongia Souaihi, a female professor at Zaytuna University, explained articles of the PSC through Koranic verses, underlining the "Islamic" character of the Code. The PSC had become itself a sacred creation of the state, neither because of its supposedly "religious" inspiration, nor by virtue of being interpreted through the Koran as Souaihi had done, but rather because it had become politically untouchable.

Since 1956 the dual insistences upon the "modern" and the "Islamic" characters of the Code have been shaped as the domain of the authoritarian state alone. Both modernism and Islam

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26 On particular cases and their interpretations by judges using sharia law, see Nazli Hafsia, *Le contrat de mariage en Tunisie jusqu'à 1956*, Carthaginoiseries, Tunis, 2005.

27 Mohamed Habib Chérif, "Le code du statut personnel entre authenticité islamique et modernité juridique," in Ministère des Affaires Religieuses, République Tunisienne, *Le Code du statut personnel. Enracinement dans l'Islam et modèle de partenariat effectif* (Tunis : Editions Ministère des Affaires religieuses, 2008), 54.

were instrumentalized by the regimes of Bourguiba (1956-1987) and Ben Ali (1987-2011) in order to give meaning to shared values common to all Tunisians as well as in order to control political dissent. The Code was said to be modern because it emancipated women and gave them some of the rights and freedoms that women could enjoy in developed Western countries. At the same time, even though "modernity" was inspired by the Western model of women's emancipation and gender equality, Islam also had to be asserted as compatible with that model. Islam and modernity were combined to try to balance the Islamist and secularist positions. In particular Islamists were kept at bay through references to the threat they allegedly presented to the Personal Status Code. The most secular reformists who demanded absolute equality, in particular in the laws of inheritance, were also turned down as being insensitive to Islamic values. In the speech he gave on the fiftieth anniversary of the Code, the Minister of Religious Affairs said: "President Ben Ali elevated the Personal Status Law to the same rank as the principles inscribed in the Constitution of the Tunisian Republic, which means that he raised this sensitive branch of law up to the highest legislative level."[28] He was alluding to the fact that the adherence to the Personal Status Code by political parties as a condition for their legal existence was added to the text of the constitution in 1997, justifying the exclusion of the main Islamist political movement, al-Nahdha, from the legal opposition.[29]

II.   Sharia as a Site of Memory and the Predominance of Religious Establishment

Participants in the 2006 Ministry of Religious Affairs conference did not note that, in contrast to the Djait project, the PSC had transformed sharia into an implicit category. On the

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28 Mohamed Habib Chérif, 46.

[29] Constitutional law no 97-65, October 27, 1997, in *Al-rāʾid al-rasmī li'l-jumhūrīya al-tūnisīya*, no 87, October 31, 1997.

one hand, Djait's project was a summary of legal provisions from Hanafi and Maliki law arranged vertically in two columns. It provided a flexible set of tools from which the judge could draw his rulings. On the other hand, the new 1956 Personal Status Code's first editions were set out in two horizontal parts: first, the text of the law with its numbered chapters and articles occupying the top part of each page, and second, footnotes at the bottom of the page explaining the articles of the law. Contrary to the columns in the Djait law project, where no hierarchy separated the Hanafi and the Maliki interpretations of sharia, the body of the text of the new Code had a higher status than its footnotes. The former *was* the law, while the latter was only a commentary of the law, formulated through the exposition of its sources, its interpretations, and sometimes specific rulings that had occurred between 1956 and the second edition of the Code in 1958. This dual form of the 1956 PSC represented a domestication of the Islamic narrative and memory. On some pages, the footnotes occupied almost the totality of the space, leaving only one line to the law itself. The types of explanations provided were varied: they referred to treatises of *fiqh* and excerpts of the Koran, as well as to real cases in which the Code was applied. However, the footnotes did not only provide "explanation." They also offered a context to the law, a background that helped one to read it in terms that differed from those of the newly codified rules. Indeed, they provided in part the religious "memory" of the law: not necessarily its exact historical origins, but rather its "equivalent" in the jurisprudential memory of the authors of the new Code. This memory constituted a layer of discourse that was explicit in the footnotes, but remained implicit in the personal status law itself. It was not practically usable as law, but was included to persuade the reader that the Personal Status Code was not foreign or exogenous to Tunisian and Muslim history. For instance, the first part of Article 5 stated: "each of the spouses must be pubescent and must not be in a situation of legal impediment (*al-mawāni'*

al-shar'iyya) to marriage."[30] This was accompanied by a footnote that read:

> Among the legal impediments to marriage is when the future husband is not Muslim and the future wife does not belong to one of the religions of the book or when she is an apostate (*murtadda*). This impediment is among the temporary ones according to the law (*shar'an*), since it can be lifted by conversion. See Ibn Juzay p. 200.[31] See His beloved book: "do not marry unbelieving women (idolaters), until they believe; a slave woman who believes is better than an unbelieving woman, even though she allure you. Nor marry (your girls) to unbelievers until they believe: a male slave who believes is better than unbeliever, even though he allure you. Unbelievers do (but) beckon you to the fire. But God beckons by His grace to the Garden (of Bliss) and forgiveness, and makes His Signs clear to mankind: that they may celebrate His praise.[32]

In this case, the Islamic law explicitly served as a reference through the quote of Ibn Juzay, a Maliki jurist, and through the mention of the Quranic verse, even if the word shari'a was not used. However, the use of the word shar' (which means revelation as well as law) remained ambiguous, all the more so in the French version of the Code where al-*mawāni' al-shari'iyya* was translated by "empêchement légal," and *shar'an* by "au regard de la loi."[33] These formulations created ambiguity because they avoided responding to the following question: was the law referred to in the footnotes of the new Code the sharia or the secular law? It is worth noting that in subsequent printings of the PSC the extensive footnote apparatus disappeared, but

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30 Muhammad al-Tahar al-Sanusi, Dā'irat al-tashrī' al-tūnisī *Majallat al-aḥwāl al-shakhsīya*, 19.

31 This is a reference to Ibn Juzay's (1321-1357) manual of jurisprudence that emphasized the Maliki school of law, *Qawānīn al-aḥkām al-shar'iyya wa masā'il al-furū' al-fiqhiyya*.

32 *Koran* (2, 221), Yusuf Ali's translation.

33 M. T. Es-Snoussi, *Code du Statut Personnel annoté*, 2ème édition, (Tunis, 1958), 15.

that new and separate textual productions from official governmental sources continued to underline the Code's origin in Islamic law. The use of sharia as a reference also produced a reification of the idea of sharia. It became a distant and obscure object, especially after its elimination from the late printings of the Code. Hence its presence as a reference had to be regularly reasserted in official publications, as if the PSC could not do without a site of memory (*lieu de mémoire),* reminding Tunisians of the historical relation of the Code to sharia.[34] In Tunisian religious, legal, and political history, sharia remains implicit and unstable. It haunts the margins of the PSC, always changing sites, from state official publications to jurisprudential interpretations.

Tunisian secularists are well aware of the fact that asserting that the sharia is a reference for the Code makes sharia a renewed object of attention, and hence renders the Tunisian law susceptible to being viewed as "religious law" or to accusations that it is not "religious" enough. They often deplore even the implicit character of sharia, and therefore reject the idea that sharia is "a reference" of the family law. For instance, Ali Mezghani, a Tunisian specialist of international private law, has reiterated that there is a radical gap between the PSC and sharia. In 1975 he wrote: "some authors still try to relate the solutions of positive Tunisian law to classical Muslim law or to fill the silences of the positive law with references to solutions offered by the different schools of Muslim law. Others, however, not being able to find a justification in Muslim law (for instance for the legalization of adoption or the prohibition of polygamy) attempt to establish these institutions with a reference to the spirit of Islam, which must be modernized.

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34 I am referring to the "sites of memory" invoked by Pierre Nora in *Les lieux de mémoire* (Paris: Gallimard, 1997).

Islamic law is dead. Long live Islamic law."[35] For Mezghani the idea of a continuity between "Muslim law"—whose existence he also questions, since for him what is usually called "Muslim law" is not "religious"—and the current Tunisian law is only a political argument used to build support of the positive law by the population. For him the reading of Tunisian law as having its formal source in Muslim law is mistaken, and one must recognize the disappearance of sharia, which exists only as part of the far historical origin of Tunisian positive law. According to Mezghani, when positive law is silent on certain issues, judges unfortunately often interpret cases following Muslim law. Judges should, on the contrary, rule on these cases with the "modernist" and "progressive" intent of the legislator in mind. The recourse to "the main reference books and fundamental texts, if need be," which was evoked by the Minister of Justice in 1956 for cases where the Code was silent, should not allow judges to interpret cases following Islamic law. For Mezghani Tunisian family law, as positive law, should speak by itself for itself and should not be related to an incommensurable and radically different system of law, such as Muslim law, in order to be interpreted. Hence for Mezghani, as well as for the secularists among Tunisian legal experts, positive law cannot be a translation of Muslim law, because these two laws belong to two radically different legal universes. This rejection of legal pluralism— although adopted and invoked by the state—is in part due to the fact that Mezghani sees law as lacking "a proper history."[36] Because law—whether called sharia or not—is only the secular result of socio-economic conditions, he argues, law can only be positive law. Whereas historically Tunisian society produced a legal system called "sharia," or shar'—literally

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35 Ali Mezghani, "Réflexions sur les relations du Code du Statut Personnel avec le droit musulman classique," *Revue tunisienne de droit*, 2ème trimestre (1975) : 53.

36 Ali Mezghani, "Réflexions…," 58.

revelation—the radical transformations of Tunisian society and economy due to foreign influence and colonization in the nineteenth century necessitated a shift to an entirely different legal system.

Hence, while Tunisian secularists such as Mezghani posited a radical discontinuity between sharia and positive law, state narratives insisted on a religious genealogy of the positive law. They used this genealogy rooted in implicit sharia to attempt to reassert the state's own religious legitimacy. They also emphasized the law's progressive character in order to keep at bay the conservative ulama and later the Islamist political opposition. However, in the eyes of many Tunisians, the authoritarian foreclosing of any public debate on these issues only made the state's efforts to characterize the law sound like empty rhetoric and drew secularists and Islamists even further apart.

In the new context of the political transition of 2011-2012, Rached Ghannouchi, the Islamist party al-Nahdha's leader and main ideologue, participated in the paradigm produced by the post-colonial modern state, rather than countering this dynamic by focusing on the question of sharia. In his writings, he often associates secularism (*'almāniyya*) with authoritarianism and modernity (*ḥadātha*). In an article published in 2011, he criticized the "secularist project" and defined it as "the marginalization of religion and its estrangement from the struggles of life."[37] In his view the task of the Islamist movement is to "reestablish the relationship between religion and life and the leadership of religion over life."[38] For Ghannouchi, "modernization," the hallmark of the secularists, cannot be acceptable within a secular environment, but only in an

37 Rashid Ghannushi, "Is the Islamist movement's project retreating?" in *Al-haraka al-islāmiyya, ru'ya naqdiyya, al-intishār al-'arabī*, ed. Mustapha al-Habbab (Beyrout: Mu'assasat al-intishār al-'arabī : Ṣināʿat al-fikr lil-dirāsāt wa-al-tadrīb, 2011) 36-37.

38 Ibid.

Islamic framework, since the Islamist project is one that embraces all aspects of life.[39] Hence Islam, in order to avoid losing its own integrity, has to "penetrate" (*ikhtirāq*) modernity, rather than the reverse,[40] His critique of secularism is common among those who advocate for religious participation in public life. However, Ghannouchi's project is not that of a liberal critique of secularism. José Casanova, in his discussion of public religions, envisioned the inclusion of religion in the public arena as legitimate in liberal secular democracies, as long as religion did not penetrate the state or political society.[41] By contrast, Ghannouchi does not envision, in a future Tunisian democracy, a separation of religion and state: in the very words of Article 1 of the 1959 Constitution, Islam is for him and for his movement "the religion of the state." Thus for Ghannouchi religion is public in its maximalist sense, as opposed to being "public" in the liberal version of Casanova's public religions. The mainstream Tunisian Islamist movement proposes religious establishment *and* democracy.

Of course the insistence on the question of the state rather than on that of sharia is related to the fact that al-Nahdha is as much a political party interested in governing the country and participating in the administration of the state as it is a religious social movement. Hence its members are much more interested in policy making than in reflecting on legal issues and on the question of sharia. This means that, for this movement, the issues related to the implementation of sharia are simply not relevant for its own mode of governance. This is not to say that the party, who came to power in the fall of 2011, did not craft policies and propose legislation based on religious principles. It means that the party operates in the framework of the modern state and

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39 Ibid., p. 37.

40 Ibid., p. 37.

41 Jose Casanova, *Public Religions in the Modern World* (Chicago: The University of Chicago Press, 1996).

insists on using more secular concepts than "sharia"—such as popular will, democracy, and electoral participation—and modern concepts such as "religion" to speak about its own political project.[42] However, the relationship between the state and religion remains ambivalent in the thought of al-Nahdha's activists. On the one hand, they clearly articulate a desire to liberate religion from state domination: the first 2011 post-revolutionary issues of their weekly journal *al-Fajr* contained several articles demanding "the liberation of the mosques."[43] On the other hand, they also insist that the state must organize (*tanzīm*) religion without controlling it.[44]

For al-Nahdha, liberation of Islam from the control of the state does not mean separation of state and religion, or even neutrality on the part of the state towards religion, in the way that liberal secularism is understood at least theoretically. The state Ghannouchi envisions is a civil and democratic state, but it must engage with religion in specific ways, to organize it, but also to *implement* it. Ghannouchi's liberation of Islam from the state occasions no rupture between them. Rather, the state is put at the service of religion, and it is up to those democratically elected to govern the state and to define the ways in which this "service" operates. It is striking that Ghannouchi does not speak of implementing sharia (*tatbīq al-shari'a*, a phrase widely used by other Islamist movements), but rather of "Islamic implementation" (*tatbīq islāmī*), a concept on which he does not elaborate and that allows him to avoid tackling the issue of sharia.[45] Ghannouchi's writings on the Personal Status Code are also brief, but they illustrate his focus on

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42 On the modern concept of religion, see Talal Asad, *Genealogies of Religion, discipline and Reasons of Power in Christianity and Islam* (Baltimore: John Hopkins University Press, 1993).

43 For instance, Muhammad Chadhili Bukhari, "ḥattā lā tataḥawwala al-masājid ilā qamīs 'uthmān," *Al-Fajr* 3, April 22, 2011, 5.

44 Interview with Ajmi Lourimi, member of the Political Bureau of the Nahdha Party, Tunis, June 9, 2011.

45 R. Ghannushi, 32 and 45.

the issue of state establishment of religion rather than on legal matters. His critique of the 1956 Personal Status Code was not a critique of the substance of the law *per se*. As such, it strikingly contrasted with the criticism of the PSC by Shaykh Djait who focused on the content of specific articles of the Code.

Ghannouchi developed a more sociological approach to what the PSC meant for Tunisian society broadly:

> Bourguiba's regime, charmed with the West … violently destroyed the pillars of ancient society, without discerning the good from the bad. He was convinced that the emancipation of women was the best way to participate in civilization. Then came the Personal Status Code. It was not merely a set of laws that reformed the legal status of women, but it came accompanied and followed by a revolution that stormed ancient society in its entirety.[46]

Ghannouchi was not against the Code itself, but rather against the broader transformation of Tunisian society that the state had initiated with the PSC and other modernization policies. Although this critique of state policies is central in the writings of al-Nahdha activists, it does not lead them to deepen their reflections about the legitimacy and the practical operations of religious establishment: How would their party, if it came in power, make the state "Muslim"? This question, rather than the issue of sharia and sharia's content, has animated the debate between secularist and Islamist activists after the uprisings of 2010-2011 and the departure of Ben Ali. In that sense, sharia has remained as implicit as it used to be.

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46 Rashid Ghannushi, *al-mar'a bayna al-qur'ān wa wāqi' al-muslimīn* (Tunis: Maṭbaʿaṭ tūnis qartāj, n.d.), 18.

III. Varieties of Religious Establishments in Post-revolutionary Tunisia

During the weeks following January 14, 2011, the interim government charged the Committee for Political Reforms (CPR) with proposing a path for the political transition. Ben Ali had announced its creation in his speech to the nation on January 13. Its tasks included drafting any necessary new legal articulations, such as amendments to the Constitution or laws on political parties, elections, and the press. Headed by Yadh Ben Achour, a well-known Tunisian expert on public law and Muslim political theory, the CPR was a small and independent committee of experts. On February 3, 2011, commenting on the tasks of the CPR in a televised interview, Yadh Ben Achour declared that he approved the election of a Constituent Assembly and the foundation of a "second republic."[47]

According to Ben Achour the laws organizing politics were in need of a radical transformation since it was under a well-tailored legal apparatus that authoritarianism had operated since independence. In particular the previous regimes successively revised the Constitution and the laws regulating the press and the political parties to further their authoritarian agendas. There needed to be "a new state," a concept that al-Nahdha's Islamists agreed with. The point was reiterated to me by Ajmi Lourimi, a member of al-Nahdha party's Political Bureau, during our meeting on June 9, 2011. However, Ben Achour added, one law remained central, and could not be put into question because it was "the real constitution of Tunisia": the 1956 Personal Status Code. It was, he insisted, the first legal text of independent Tunisia and became law before the Constitution of 1959 was proclaimed. Its principles constituted a "republican gain" (*maksab jumhūrī*).

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[47] Yadh Ben Achour, interview on Nessma TV, February 3, 2011.

But the Tunisian people were "not yet at the level of the PSC": "How can we improve relationships within the family? We need decades! The Code is comparable to the first Tunisian constitution. It would be a mistake [to change it]. What if a [political] party obtained the majority of seats and wanted to change it? We should say: there are principles we cannot change."[48] Ben Achour, grandson of Shaykh al-Tahar Ben Achour, who had acquiesced to the Personal Status Code in 1956, looked at the PSC as more progressive than the people it sought to change and regulate. For him the Code had been established by Bourguiba in order to transform Tunisian family and society. It had to serve as a tool for social engineering, but had not entirely accomplished its task yet.

According to Yadh Ben Achour, the PSC's "primeval" status in the chronology of the legal history of independent Tunisia and its comparability to a constitutional text made it an inalterable law that needed to remain a solidly and broadly legal foundation in post Ben Ali Tunisia. It is noteworthy that in the same interview Ben Achour also declared that Article 1 of the 1959 Constitution stating that Islam is the "religion of the state" should remain in the future constitution. While he did not elaborate upon his understanding of this article's meaning, he insisted on what he viewed as two central pillars in the legal future of Tunisia: women's rights and Islam as the state's religion, a position that converged with the state reformist options that President Bourguiba and his entourage had chosen since the independence of Tunisia.

During the year 2011, a period of political instability and uncertainty, when politicians and activists were looking for and vigorously debating possible paths to democratic transition, the themes of the Personal Status Code and of "the relationships between religion and the state" were at the forefront of public debates. They seemed tightly connected and were becoming at

48 Yadh Ben Achour, interview on Nessma TV, February 3, 2011.

least as prominent as issues such as the economy, the independence of the justice system, the separation of powers, or human rights. Opinion articles, televised debates, street demonstrations, and opinion polls expressed deep-seated anxieties about these two issues. Women's rights and the relationship between state and religion were seen as interconnected and as central to the definition of the constitutional and political future of Tunisia. This was because the post-colonial state had originally defined and shaped "Islam" and "women rights" as two domains essential for its authoritarian fashioning of society. The PSC in particular was seen as "exceptional" by Tunisian politicians and legal scholars. It was seen as standing out among all other family codes in the Arab world.[49]

Women's progress and Islam, as expressed in legal narratives, were indeed two foundational elements in the construction of the post-colonial state. There were continuities with the French colonial endeavors to reform law and liberate women from traditional Tunisian mores such as the wearing of the veil and seclusion.[50] From the modernist and secularist Tunisian state elites' point of view, the state drew its identity from Islam *and* protected women's rights through its legislative enterprises. During the post-colonial period, this progressive agenda went hand in hand with an authoritarian one: Islam was under the regulatory control of the state, which shaped its meaning and the authorized locations of its manifestations. Feminism was also a narrative that was the prerogative of the state whose elites mobilized women at its service.[51] It was not just that

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49 Sana Ben Achour, "Le code tunisien du statut personnel 50 ans après: les dimensions de l'ambivalence," *L'Année du Maghreb* II (2005-2006) : 55-70.

50 See Malika Zeghal, "Veiling and Unveiling Muslim Women: State Coercion, Islam, and the 'Disciplines of the Heart,'" in *The Construction of Belief. Reflections on the Thought of Mohammed Arkoun*, ed. Aziz Esmail and Abdou Filali-Ansary (London: Saqi Books, 2012), 127-149.

51 Sana Ben Achour, "Le code tunisien."

these two domains had to be protected, but, more essentially, they fell under the control of the state, which guaranteed their permanence through an exercise of authority. Each of these domains defined the limits of the other: women's rights countered conservative interpretations of Islam, and Islam limited women's rights. The state, as guardian of both domains, could therefore control each one of them with the help of the other.

After the revolution of January 14, 2011, as the state's authority was weakened and often put into question by a recalcitrant civil society, the principles at the foundation of the PSC and Article 1 of the 1959 Constitution were at stake. The Islamists, in particular, drew the public's attention to the fact that the modernist character of the previous regimes' state policies had been, for more than 50 years, related to authoritarianism. However, it is quite remarkable that the issue of sharia law was purposely marginalized by the dominant political elites in favor of the larger idea of "Islam" as the "religion of the state."

Since democracy is now the declared project of both Islamists and secularists, it is important to address how they all envisioned religious establishment in a democratic state. A few months after the departure of Ben Ali, the responses to this question varied, but it is possible to differentiate between the two camps' positions. Among al-Nahdha's Islamists the prevailing and official view was that "Islam is the religion of the state" in the sense that the identity of Tunisia as a country is Islamic, the majority of its citizens being Muslim. According to Ajmi Lourimi,

> We found this article [Article 1 of the 1959 Constitution] in front of us. It
> does not pose a problem. There is little contention around this. There is a
> minority that is afraid that if the government changes and if there is a new
> majority that takes over, article 1 will be used to change the laws. These
> fears have no basis, because this article only gives an identity to the

Tunisian people, to the political aspect of Tunisia, and to Tunisian society. Even in France there are discussions about the identity of the people. We see that on television. European politicians discuss it. They discuss the flag, the values, their own history. … In the end, when we speak about identity, Europe remains Christian in its history, Christian in its civilization, in particular when defining itself *vis-à-vis* Islam. This is a matter for discussion: how is the regime of Republican France going to deal with Muslims? Is there going to be integration? What about the religious symbols of Islam? This is what is discussed. There is a way in which the French Republic will adapt. And this happens even in regimes that are secular.[52]

According to Lourimi, Article 1 defined the identity of Tunisia.

Lourimi asserted that any state, even a secular one, necessarily engages with religion when dealing with identity matters: "In the end, when we speak about identity, Europe remains Christian." In particular, for Lourimi, the Tunisian state must organize Islam administratively: it must continue to provide and maintain religious structures such as mosques, religious education in public schools, the administration organizing the pilgrimage to Mecca, etc. However, it should not have its say in the content of religious narratives and interpretations, which should be freely produced. For example, religious authorities should be dissociated from the state, and even elected by the people, according to Lourimi.[53] For him, since al-Nahdha envisions the state as a

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52 Interview with Ajmi Lourimi, Tunis, June 9, 2011.

53 Ibid.

civil state and not a theocracy, democracy and religious establishment should lead to a "liberated" public Islam, with no religious monopoly by the state or by any political party.

Lourimi presented a liberal conception of religious establishment that allows space for individual religious and political rights, but diminished with a certain irony the secularists' own insistence on their liberty to conduct their personal lives—which he reduced to their alimentary habits and their dress—in the way they see fit:

> I am interested in Habermas who has written on these issues. He says that secularism diminishes the religious perspective and excludes (*iqsā'iyya*) religion from the public space … In Israel, it is not the case that citizenship is separated from religion. There are religious parties and secularist parties. All have the same status. They can even collaborate and ally. If society is pluralist, this can work and religious parties can be legal and legitimate. We have the legal and political framework. There is a set of values that are not negotiable: the individual's right to life, expression, political participation, and work. These are the main basic principles that will prevent us to go back, to go back to barbarism, to tyranny (*zulm*) ... This is why the fears [on the part of the secularists] are not legitimate according to me. The Islamist movements are afraid *for* Islam, and the secularists are afraid *of* Islam. And the secularists are afraid for their own individual way of life. They are afraid for their own individual rights. But their fears are not about political rights, or citizenship rights, or religious rights. They are afraid not to be able to buy their wine, not to be able to dress the way they want.[54]

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54 Ibid.

This characterization of secularists as not interested in defending individual political rights is certainly an exaggerated description, especially coming from Lourimi, who collaborated in the October 18 movement, a coalition started in 2005 between members of secular left parties and al-Nahdha. Indeed, in the same interview, he also described to me al-Nahdha's political alliance with the activists of the secular left before the revolution and his respect for the latter. However, it is instructive that the Islamists see the secularists as not protecting human rights in general, but rather as safeguarding a way of life that Islamists often associate with Western modernity, in particular French culture and mores (alcohol consumption and western dress).

Tunisian secularists, on the other hand, want a "secular establishment of Islam"—that is, a secular society without separation of state and religion. For them true democracy, in the context of establishment, will be enough to guarantee that religion does not contradict individual rights. Riadh Guerfali, whom I quoted earlier in this chapter, drew a difference between laïcité and secularism that echoed Lourimi's comparison between the French and Israeli systems. He also distanced himself from the French model of laïcité:

> Laïcité is a total rupture between the state and religion. Contrary to laïcité, secularism needs, in order to succeed, the affirmation of a relationship between state and religion … What will be the meaning of 'Islam religion of the state' in the future constitution of Tunisia? We still doubt that this phrase could be defined precisely. Since January 14, 2011, we know what it cannot be: it must not go against what Tunisians died for… that is the demand that the dignity of persons be respected. This dignity cannot be detached from the respect of fundamental freedoms and from the guarantees that protect the citizen in a democratic state. To summarize, the meaning that we give to the statement that Islam is "the religion

of the state" does not matter. What is non-negotiable after January 14 is that this principle's meaning must not contradict these freedoms. And this is already a crucial definition ... There is no need to eliminate from the constitution the statement that will allow the state to control the religious field, but there is a need to consolidate the necessary laws that will allow us to have a secularized democracy.

To make even clearer the secularist project of a religious establishment in a democratic Tunisia he wrote, "By appropriating religion, we will keep a more or less tight control on the religious field so that it does not contradict the democratic project."[55]

Very few politicians in Tunisia envision the possibility of separating religion and the state. However, as we saw, there are two different perspectives on religious establishment in Tunisia. The Islamists' vision is that of an establishment that liberates religion from the tight control of the state but keeps it under its protection. This vision will leave open spaces for narratives on the continuity between the secular law and sharia, similar to those of the previous regimes. It is noteworthy that Rached Ghannouchi, right after coming back from exile, declared that he accepted the Personal Status Code because it mostly derived from sharia. However, when the Islamists came to govern the state in November 2011, sharia was not made more explicit. Al-Nadha envisioned religious establishment as protective of "sacred values" (*muqaddasāt*) when one of the party's representatives in the Constituent Assembly drafted a bill in favor of penalizing offenses to "sacred values." In that sense they were in perfect continuity with the

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55 Riadh Guerfali, ""L'islam religion d'Etat," Disposition constitutionnelle guarante du processus séculariste de la démocratie tunisienne," March 31, 2011, http://nawaat.org/portail/2011/03/31/islam-religion-detat-disposition-constitutionnelle-garante-du-processus-seculariste-de-la-democratie-tunisienne/ (accessed July 22, 2011).

press law of 1975, used by the previous regime, which stated that "belittling the dignity (*nayl min karāma*) of an authorized religion" was a criminal offense (article 48).[56]

For the Islamists freedom has its limits, which are set by Islamic values. For the secularists, on the other hand, the interpretation of establishment is one that will allow control of religion by the state and the silencing of any sharia-based project. In that sense secularists do not differ much from either of the previous political regimes of Tunisia in their definition of religious establishment. Even though they agree with Islamists on the project of democracy, they still envision the state as the strongest regulator and restrainer of religion. While they want establishment to take place in a democratic framework, they do not seem to think that state control of religion can impair democracy. This does not mean that secularists are anti-democratic, but rather that they are not ready to accept all the consequences of religious freedom. That is, they are not prepared to embrace the effects of a liberal secularism that would allow the nation's whole range of religious actors and organizations to operate freely in the public sphere.

This Tunisian brand of secularism is at odds with a vast literature that describes secularism as necessarily coextensive with "liberalism."[57] Indeed, as the Tunisian example shows, the exclusion of religion from the public sphere can take place through religious establishment and this even under an authoritarian regime such as before January 14, 2011. What is even more striking is that Tunisian secularists, who declare their attachment to democracy, are not ready to "liberalize" the religious sphere in the name of individual freedoms for fear that it

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[56] Law no 1975-32 ("*majallat al-sahafa*") published in *al-ra'id al-rasmi li'l-jumhuriyya al-tunisiyya*, 29 (April 29, 1975), 992-999.

[57] See in particular Talal Asad, *Formations of the Secular. Christianity, Islam, Modernity* (San Jose, CA: Stanford University Press, 2003).

would threaten the very existence of a secular society. Hence projects of secularism can be expressed in many institutional and political forms. They can be found in separation or establishment, in liberal democratic forms and in more authoritarian forms of governance. Over the long term, the political transformations spearheaded by the Arab uprisings will reveal new forms of relations between the state and religion and will display new varieties of secularism that will be produced not just by the traditional "secular" segments of these societies, but also by the so-called "Islamists." If we define secularism merely as the organization and regulation of any type of religious presence through specific institutional arrangements, then religious establishment is in itself a form of secularism, whether it is establishment as interpreted by the secularists or by the Islamists.